IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *et al.*,

Petitioners,

vs.

JOSEPH CARROLL, *et al.*,

Respondents.

No. 310

JOSEPH CARROLL, *et al.*,

Petitioners,

vs.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITIONERS (PLAINTIFFS') REPLY BRIEF

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Counterstatement of Certain Facts

A. Defendant Union's brief in a number of places (pp. 17, 41, 43, 59, 65) irresponsibly uses[1] words like "undis-

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[1] *E.g.*, "The District Court had properly rested its legal conclusions on *uncontroverted* detailed evidentiary findings of job and wage competition between the leader and employee musicians. The Court of Appeals, though accepting these *uncontested* findings, wholly misconceived their legal consequences. * * *" (p. 41; emphasis added)

"Given these findings, based on *uncontradicted* evidence, enforcement of a minimum price * * * when the leader does not perform, operates *in fact*, to prevent him from competing with other leaders by reducing employee wage standards." (p. 59; emphasis added)

puted", "uncontradicted", "uncontroverted", "uncontested", to refer to statements which plaintiffs have always vigorously challenged and which are in fact supported by no substantial evidence in the record.

Not only were involved findings by the District Court controverted and contradicted; they have no basis in any probative evidence. As often as defendant Union's prate of these District Court findings, *they never cite pages of the record which allegedly support them.*

The Supplement to Cross-Petitioner's main brief, as well as Point IV thereof, show very plainly that the District Court's findings on "job and wage competition" are without support in the record.

B. Likewise, the Union briefs in these cases erroneously or falsely disclaim the patent existence of Union *combination* with non-labor groups. See Cross-Petition, pp. 18-19; Brief in Support of Cross-Petition, pp. 11-14, Point II; and Cross-Petitioners' main brief, pp. 42-43; 46-50.

C. Upon the basis of an agreement made by AFM attorneys and plaintiffs' attorney (as reflected in Judge Friendly's decision in *Carroll* v. *Associated Musicians,* 310 F. 2d 325), Local 802 permitted Carroll and Peterson to use Union musicians, *provided they did not practice their profession by personally leading their orchestras.* See AFM brief, pp. 10-11. The Trial Court unrealistically and without evidence [and in complete contradiction of its own earlier findings in *Carroll* v. *Associated Musicians,* 51 LRRM 2310[2] (1962) at pp. 2312-14 (§ 2), "As to Plaintiff Carroll" (§ 3), "As to Plaintiff Peterson" and the portion entitled "Defenses"] and in contradiction of common sense found that in so operating the "Union does not significantly hinder them from carrying on their business in

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[2] The LRRM indices *erroneously* give to this case the following citation: 206 F. Supp. 462.

this fashion", and, insofar as "they do not themselves conduct or play, the charge of pressuring them into the Union has not been sustained" (App. 168). This grossly unsupported finding, neglected (i) the obvious fact that Carroll and Peterson were being held out by the Unions as horrendous examples of what would happen to an orchestra leader who was expelled from Union membership; and (ii) the fact that Carroll and Peterson were prevented from acting as orchestra leaders in the manner characteristic and required of orchestra leaders. This necessarily entailed irreparable damage, as well as money damage. Neither of these consequences affect leaders who are AFM members.

"The Court: Normally you would have led your orchestra, is that so?

The Witness: Yes, sir.

The Court: And you had some additional expense by reason of the employment of somebody to lead the orchestra?

The Witness: Because of the—

The Court: Well, you had it?

The Witness: Yes, sir.

The Court: And you were unable to lead the orchestra because of certain acts or pronouncements of the Union, is that so?

The Witness: Yes, sir.

* * *

Mr. Dannett: And he also on those occasions would have acted as drummer at least on some or all.

The Witness: Not all of them.

The Court: You would have in some of the instances?

The Witness: Depending on the size of the orchestra, your Honor." (Tr. 1778-79)

"The Court: Did you pay additional monies to these leaders who took over for you?

The Witness: Yes sir. Both for a leader to take over and for a musician.

The Court: A drummer?

The Witness: A drummer to make up a minimum of six or a drummer to make up a minimum of five or twelve actual playing musicians in the grand ballroom of the hotel not including me. Having contracted for twelve pieces, I wound up providing thirteen if you figure me as still being in existence. Having contracted for six pieces I wound up providing seven." (Tr. 1779)

In spite of Kenin's testimony that the Union *insists* that all orchestra leaders become Union members (Tr. 164-165), and in spite of the penalties imposed upon Carroll and Peterson precisely and only *because they were expelled*[3] *from Union membership* (in part for not demanding from their purchasers the minimum *prices* fixed by the Union), the Trial Court found that coercion into Union membership was not established!

The Courts below, nevertheless, uniformly refused to grant injunctive relief, despite the fact that the purpose of the injunction was to prevent defendant Unions from punishing Carroll and Peterson for having instituted the instant actions. See *Carroll* v. *Associated Musicians,* 51 LRRM 2310, reversed on other grounds, *which later became moot,* upon the basis of Judge Friendly's decision for the unanimous bench in 310 F. 2d 325.

In any event, the unique arrangements to which the Trial Court refers (App. 168) and to which the AFM Brief refers (pp. 10-11) under the heading "The Alleged Pressuring of Orchestra Leaders into the Unions" *was*

[3] It is to be emphasized that the only reason why Carroll and Peterson refused to demand the Union minimum *price* from their customers was because the instant actions had recently been commenced; and plaintiffs did not want to act in a manner inconsistent with their complaints herein.

merely a temporary settlement pending final determination of this litigation, as expressly appears from Judge Friendly's Opinion. (Last paragraph of 310 F. 2d 325 (1962) at 327.)

The Trial Court and Unions seem to think that this is and was the *permanent* predicament of Carroll and Peterson. The Trial Court first refers to the *temporary settlement* and *then uses the transient, atypical condition it created to "prove" that Carroll and Peterson were not pressured* into the Union! Compare the Trial Court's original decision respecting Carroll and Peterson with the later Memorandum of Judge Friendly (310 F. 2d 325), by which, for reasons now moot, Judge Levet was reversed in granting an injunction in favor of said plaintiffs in 51 LRRM 2310.

D. In several places (*e.g.*, p. 29), the AFM Brief misrepresents the Second Circuit's ruling respecting AFM *price-fixing*. The Court below had concluded "that the Unions' establishment of price floors *on orchestral engagements* is not a subject of such direct and overriding interest to unions * * * that it is a mandatory subject of collective bargaining * * *" (App. 197; emphasis added). This language the AFM Brief twists as follows, equating "orchestral engagements" with "club date engagements":

> "But the Court of Appeals for the Second Circuit, while reaffirming the findings of job and wage competition, invalidated those regulations establishing the minimum compensation of the leaders *on club date engagements.*"

The ruling of the Second Circuit was *not* confined to "club date engagements"; it was a ruling on prices of "orchestral engagements." Likewise, it was not just a ruling on "the minimum compensation of the leaders"; it was a ruling on the "*price* of orchestral engagements."

The complaints here do not even mention the "club date field."

E. Defendant Unions, in their main Brief (p. 27) dogmatize: "* * * Because of the singular nature of employment relationships in this field, there is a direct, rather than an indirect, relation between the price received and the wage paid to the employees". *Ipsi dixerunt.* The real employment relationship in this field is not singular" in the sense of being *unique.* For example, in the catering industry, the caterer has a core of waiters and waitresses on whom he regularly calls. When he needs more than these he hires extras, either through the union or through an employment agency. The same is true of painting contractors, building contractors and others.

F. The AFM main Brief (p. 5) again grossly caricatures what happens when a client engages an orchestra leader. This travesty on the real picture was criticized by plaintiffs in their "cross-petitioners' brief in opposition to petition for writ of certiorari" at pages 4-5. It completely neglects the *normal,* expensive telephone solicitations made by professional leaders (Tr. 1688). If leaders are as indistinguishable from sidemen as the Union Brief tries to make them, there could be no *professional* leaders. It is nothing short of shocking misrepresentation to affirm, as do the Unions: "Normally, the purchaser of the music * * * approaches a musician * * * [who] * * * thereby becomes the 'leader' * * *" (p. 5). As the Union statistics demonstrate (Defendants' Exhibits K, L and M, App. 398b-400b), the *normal* procedure is for clients to go *to an established professional leader*[4] (one of a group doing the vast majority of engagement contracts), not to a sideman who "becomes" a leader *ad hoc!*

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[4] This term, includes a person like orchestra leader Flatte (Tr. 1358-93) who by day works as a salesman in textiles, but of evenings is an orchestra leader, never a sideman; and who has an established business as leader. It also includes the leaders of "the big bands" and the "name bands", no matter now defined, as well as of many orchestras having unknown or relatively unknown names.

Counterargument

1. Alleged "Job and Wage Competition".

A. The AFM brief pins everything on the so-called "job and wage competition between leaders and employee musicians", which it regards as the "crucial determinant" (p. 31). Thus, because of alleged "job and wage competition": (i) Union regulation of the "performing leader's" income is "lawful" (pp. 43, 51); (ii) There is no *combination* between the Unions and any non-labor group (47).

The index to the AFM brief contains no reference whatever to the nationwide systems of *price*-fixing and "*price*-lists", which have characterized AFM regimentation of the musical industry for more than 60 years. The keystone position of the incantation, "job and wage competition" (which the AFM Brief never analyzes or separates into actual or conceivable categories based on record evidence), is luminously revealed in the AFM argument and argument headings. The trouble with the argument is that the alleged "job and wage competition" between leaders and employee musicians is a myth or fiction for which no evidence in the record is or can be provided. See cross-petitioners' main Brief, Point IV and Supplement; cross-petitioners' Brief in support of the cross-petition, pages 15-19; and the cross-petition, pages 26-33.

The defendant Unions' Brief invokes the rubric: "job and wage completion", more than 43 times.[5]

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[5] The AFM Brief seeks to justify conduct of which plaintiffs complain by the mere formula "job and wage competition" on 12 pages (pp. 29, 30, 32, 35, 37, 41, 43, 44, 45, 47, 48 and 51). In thus repeating the quoted phrase, its meaning is left by defendant Unions for speculation. Who are the competing parties is not consistently indicated or is not specified at all in the pages just cited; nor are the meanings of the words "job" and "wage" specified. (See Cross-

(Footnote continued on following page)

Competition *among professional orchestra-leader-employers* for orchestra leader's work is simply none of the business of a trade union. Unions which regulate such employer-entrepreneurs' competition should *not* be protected. Unions cannot possibly engage in regulation of such competition without combining with non-labor groups. It is significant that, despite its conjury, more than 43 times, with "job and wage competition", the Union Brief at no time cites any specific, actual instances of such "competition" *from the record.* The reason is clear. *There is no record evidence of any such competition.* The Unions simply rely upon the Trial Court's unsupported finding, allegedly predicated upon the pages of testimony gathered in the Supplement to the Cross-petitioners' Brief on the merits. That Supplement shows no testimony of actual "job and wage competition" and *names no competitors.* There is only testimony that, on occasion, some (usually unidentified) people, *sometimes work as sidemen* and *at other times work as "orchestra leaders". E.g.,* the Unions' main Brief (p. 9): "* * * 50% of plaintiff Levitt's sidemen acted as orchestra leaders during 1960-64." How often?

(Footnote continued from preceding page)

petition for Certiorari, pp. 26-31.) However, in other places, one or both of the competing parties are described. For example, defendant Unions speak of the *job and wage competition* "of working employers" (pp. 26, 28), "of the leaders" (pp. 25, 43), "by the leaders" (p. 22), "from working employers" (pp. 23, 43, 57), "by working employers" (pp. 29, 30, 32), "from the employer himself" (pp. 55, 56) and "of the employer himself" (p. 57). At other times the defendant Unions speak of job and wage competition "with employee musicians" (pp. 25, 27, 29, 31, 61), "with employees" (p. 41), "with its employee members" (p. 61). In two places the Union brief speaks of *job and wage competition* "with the union members", without specifying whether those members are *employee* members or *employer* members (pp. 34, 49). On five pages, the *job and wage competition* is "between leaders and employee musicians" (pp. 31, 40, 41, 46) or "between leaders and sidemen and subleaders" (p. 32). The *job and wage competition* is "with each other" (p. 31), "among leaders" (p. 53) and "by his alter ego" (p. 55).

Where? For whom? At what prices? In what market? No testimony answers these or similar questions.

Such "competition" is alleged to be for *jobs* and *wages* between *leaders* on the one hand and *employee musicians* (sidemen and subleaders) on the other hand. This necessarily means that *leaders* and *employee-musicians* both strive for one, some or all of the following *alternatives:* (i) jobs *as leaders;* (ii) jobs *as subleaders;* (iii) jobs *as sidemen;* (iv) musical *engagement contracts;* (v) *income of leaders;* (vi) *wages of subleaders;* or (vii) *wages of sidemen.* There are no other possible alternatives.

Plaintiffs as orchestra-leader-employers and businessmen, derive their livelihoods from the profits they realize from practice of their profession. This they can do only because they have developed their businesses to the point where they have enough clients and profits to support themselves and their families. It should be obvious to common sense, therefore, that such orchestra-leader-entrepreneurs have better things to do with their time than to compete *for jobs as employee-musicians* with subleaders and/or sidemen. Likewise, it should be evident that established leader-entrepreneurs do not compete for *wages* with sidemen or subleaders. They spend their time much more profitably by working *as leaders* than by working as employee musicians. They would only obstruct their own success *as leaders* by seeking *wages* as sidemen or subleaders. These considerations eliminate *alternatives* (ii), (iii), (vi) and (vii) above. They are alternatives without support in the record; simple reasoning about the business and profession of orchetra-leader-employers refutes them. Not one piece of evidence in the record shows that any of the plaintiffs, or any other regular orchestra leaders, ever competed for the jobs or wages *of sidemen or subleaders.*

Orchestra-leader-entrepreneurs do compete for orchestra engagements with other orchestra leaders. This is *alternative* (i) in the above listing. But no union has the legal

right to lay down the rules for competition among employer-businessmen like plaintiffs. It is also true that professional orchestra leaders like plaintiffs do compete for *engagement contracts,* even when they do not perform as leaders for such contracted engagements. This is *alternative* (iv) in the list set forth above. Once more, however, this is competition for business among leader-employers, which is not subject to lawful union regulation.

There are in New York City a handful of orchestra leaders who are *employees* (and "supervisors" within the statutory definition and who therefore are paid wages. (*E.g.,* Mr. Paige, of Radio City Music Hall.) There is not one jot or title of evidence in the record to show that any professional orchestra leader like plaintiffs ever competed with such employee-leaders either for their jobs or their wages. This eliminates *alternative* (v) in the foregoing listing.

There are employee-musicians who aspire to be leader-*employers;* and who, actuated by that aspiration acquire, from time to time, small contracts for musical engagements. *They act as leader-employers pro tanto.* They may seek gradually to build up businesses and reputations *as leaders.* But they can do this, not by remaining *employee-musicians* (sidemen or subleaders), but only by venturing into the business of the orchestra-leader-entrepreneurs and taking the risks of that business. Once they become businessmen and employers, they should no more be subject to union regulation than other businessmen. This also is *alternative* (i) stated above.

The foregoing analysis demonstrates the emptiness of the Unions' verbal fugue: "job and wage competition".

B. The Brief for the American Federation of Labor, Congress of Industrial Organizations as *amicus curiae* is, from start to finish, based upon similar, fundamental errors of fact: (i) that orchestra-leader-entrepreneurs like plaintiffs are "in direct wage and job competition with their

employees"; (ii) that defendant Unions in fixing prices and in restraining competition did not combine with non-labor groups; and (iii) that the shibboleth, "job and wage competition", is the "Open Sesame" leading to Union exemption from antitrust law liability. These massive errors make it unnecessary for plaintiff-leaders to waste much time in refutations and counter-arguments; because Plaintiffs' previous Briefs as well as their Cross-Petition amply expose these errors.

The AFL-CIO Brief is wide of the mark in basing its argument upon the demonstrably inept statement: "The Union activity in question does not take the form of a combination between labor and non-labor groups through agreements or otherwise" (p. 3). The Union price-fixing, suppression of competition and other monopolistic conduct in these cases could not possibly occur or become a market reality unless there were actual *combination* between the Unions and many non-labor groups (leader-employers, booking agents, hotels, nightclubs, restaurants, caterers, *et al.*). Moreover, since AFM insists on the use of its Form B contract for each musical engagement; and since the Form B contract expressly incorporates by reference all Federation and Local Bylaws (including those which impose prices, suppress competition, etc.); it is clear that AFM and Local price-fixing, suppression of competition, etc., are furthered through the Form B *agreements* (which necessarily imply *combinations*), signed by hundreds of thousands of purchasers of music and the involved orchestra-leader-employers. Form B contracts are also always used by booking agents.

C. Throughout their argumentation the Union Briefs blandly assume that the Federation and its Locals—unions which have for decades refused to engage in collective bargaining and which have unilaterally imposed closed shops in violation of the NLRA—are in precisely the same situation as those unions which, *in good faith* and obedient to statute, regularly bargain collectively with employers of

their members. The omnivorous "interests" of the law-breaking Unions here are invalidly *equated* in the Union Briefs with the legitimate *labor interests* of labor unions, which comply with Federal statutes and which deal with employers, as required by the definitions of "labor organization" appearing in the NLRA, in the Taft-Hartley Act and in the Landrum-Griffin Act.

For example, the AFL-CIO Brief states:

> "* * * It would, therefore, be inconsistent with the trend of Congressional action and of this Court's prior decisions to allow judicial evaluations of the importance of the *direct benefits for employees obtained from a collective agreement* as compared to the costs of the restrictions upon others." (p. 19; emphasis added)

In the instant cases, no benefits whatever were obtained for employees from any collective agreement. None "of this Court's prior decisions" involve a situation as anomalous as the instant cases, where the predatory practices of the Unions are revealed by extensive law-breaking.

There is simply no precedent in other unions for what the petitioning Unions have been doing in the entire musical industry since 1935.[6] Not one of the cases cited by the Union Briefs exhibits union conduct which so bristles with violations of statutes and with repudiation of the statutory meaning and function of labor unions. It is pious hypocrisy for such Unions to invoke repeatedly such nomenclature of "collective bargaining", "mandatory subjects of bargaining", "the trend of Congressional action" on labor subjects and "this Court's prior decisions" in labor law. The *Oliver*, the *Fibreboard Paper Products, Corp.*, the *Lake Valley*, the *Hutcheson*, the *Allen-Bradley*, the *Jewel Tea* and the *Pennington* cases all involved unions which bargained with employers.

D. No regular *employer*, plaintiffs submit, should ever be placed in a *labor* group. No authoritative case has ever done this.

2. The Alleged Evidence of Wage Cutting.

The AFM Brief (p. 58) quotes a booking agent, Joe Glaser: "'If the leader can't get scale, he couldn't pay the sidemen's scale.'' The excerpt was taken out of context. In context, it simply means that a leader (like any other businessman), who *constantly* took in less than his wage expenses, would in the long run be unable to pay those wages (or to stay in business). Established professional orchestra leaders (like all businessmen) are not in business to sustain losses. Like department stores which advertise so-called "loss leaders", plaintiffs assert the right *occasionally* to take a loss, either by doing an engagement for nothing or by charging a nominal fee, where this is prudent business policy and good advertising. But in all such instances, they, like other businessmen-employers, always *pay full scale to their employees;* just as orchestra leader pay full scale to their sidemen, if the particular purchaser of music eventually fails to pay the price of the engagement. Glaser also testified (App. 62b): "After licensing, I would say it ["price-cutting"] was definitely and positively stopped."

Union witness Stevens is quoted (AFM Brief, p. 58) as a "leader". He is not, according to his own testimony, an established, professional orchestra leader. He has too few jobs per year to operate as *professional* orchestra leaders do. Moreover, he "frequently" acts as a sideman and as a subleader (fn. 21, p. 53. AFM Brief)—something *professional orchestra leaders* never do. The excerpt from Steven's testimony on direct examination (p. 58, AFM Brief) shows that *6 or 7 years ago* on unspecified occasions, *whose number is not revealed,* he submitted bids *as an "orchestra leader",* which were "below the Unions' minimum price." He admitted that, on such occasions, he paid

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[6] See the seventeen types of Union abuses listed in the Cross-Petition for Certiorari (pp. 23-24). These the Union Brief deprecates but does not deny.

his sidemen below the Union scale. Such a person, of course, does not speak for or typify plaintiffs.

But compare what Stevens said on direct, with what he said on cross examination (Tr. 3095-96):

> "Q. When you acted as leader in the single engagement field who decided on the wages to be paid to the sidemen you were leading? A. Well, the Union because *I pay Union scale to the men and I may pay over but I don't pay below Union scale.*" (Tr. 3095; emphasis added)

3. The Alleged Threat Posed by "Working Employers".

In their main Brief, defendant Unions revert *passim* to their "working employers" argument (p. 28; see also pp. 29, 30, 42, 43, 56). Defendant Unions consider it "unfair" for an orchestra leader to act as a leader *must* when leading his orchestra! Practically all orchestra leaders play instruments; and when they do so, they lead their orchestras by the manner in which they play. Defendants, apparently, want to unhook the locomotive from the train, expecting the train to get there just the same!

The Unions claim *to represent* both employers and employees. But they want only some of their members (employees) to work! They have bizarre notions of their duty equally to represent members.

"In other words, where a union in fact seeks to ward off unfair competition by working employers, its actions are immunized from antitrust liability because (1) a union may eliminate price competition based on differences in labor standards or (2) because a union may lawfully combine with members of a labor group or (3) because a union demand that a working employer receive a stated minimum is a mandatory subject of bargaining" (AFM Brief, p. 30). This complex statement reveals very starkly the conflict of interest necessarily implicit in the pretense of representing both *employers* and employees! It is built on

fiction: that there is unfair competition by "working employers" (Cross-petitioner's main Brief, Point IV and Supplement). Plaintiffs are not adverse to elimination of price competition *based on differences in labor standards set by collective bargaining.* But, the Unions here eliminate competition below *Union prices,* even where such competition is *not* based on differences in labor standards. (Within Local 802 there are *no* differences in labor standards for orchestra leaders.) Neither case law nor statute backs the statement that a union demand that a "working employer" receive a stated minimum is a mandatory subject of bargaining.

AFM and its Locals allegedly require orchestra leaders to become Union members for the following reasons (AFM Brief, p. 31):

(1) Orchestra leaders are working musicians who perform a musical service, whether they conduct by playing an instrument or by waving their arms. The underlying, erroneous innuendo is that orchestra leaders like plaintiffs perform services *identical* with employee musicians. See this Reply Brief, pp. 17-25 and fn. 15 p. 35.

(2) "A musician who is the leader on one engagement is more likely than not to be a subleader or only an instrumentalist on the next engagement." This statement is untrue, and has no support in the record, with respect to plaintiffs or other professional leaders.

(3) "Even those leaders who may not now act as sidemen began their careers as instrumentalists." This correct statement is hardly relevant; because plaintiffs were not professional orchestra leaders *when they began their careers as leaders.* Neither plaintiffs nor those in the class of plaintiffs act as sidemen today.

(4) "Musicians who perform club dates also compete for engagements in other fields * * * in many of which the leader * * * is unquestionably an employee." The quoted

statement is irrelevant, because plaintiffs are *employer*-businessmen. The number of *employee* orchestra leaders (such as Raymond Paige at the Radio City Music Hall and Leonard Bernstein at the New York Philharmonic) is negligibly small, numbering less than 10 in New York City. Such employee-leaders are, however, clearly "supervisors" as defined in the NLRA. Neither plaintiffs nor other professional leaders ever compete with such employee-leaders.

Mr. Manuti, then President of Local 802, very well understood that the membership of orchestra-leader-employers was an artificial and convenient contrivance to shield a group of businessmen from antitrust liability, as his own examination before trial revealed (App. 99).

4. The Alleged Evidence of Displacement.

The AFM main Brief tries to exploit (pp. 7-9) the District Court's unsustained Finding 45 (App. 132) that orchestra leaders "displace the services of a sideman who otherwise would have been engaged to play the same instrument" played by the leader (p. 7); and that there "is a high degree of interchangeability[7] in work functions among orchestra leaders, subleaders and sidemen" (p. 8). In both form and substance these findings by the District Court are irrelevant speculations. They fail to take

[7] As was shown in plaintiffs' main Brief, p. 8, more than 90% of the Local 802 members who file contracts as "orchestra leaders" are really *sidemen*. This immediately differentiates them from plaintiffs and other professional leaders, who do not act as sidemen. Such sidemen number between eight and ten thousand. The "orchestra leaders" in this group of *sidemen* are in a sense interchangeable with *sidemen* and *vice versa*. See defendants' Exhibits L and M (App. 398b-400b) analyzed in Plaintiffs-Appellants' Brief in the Second Circuit, page 12; see also Cross-Petitioners' main Brief, page 9. In other words, the Max Sontag type of "orchestra leader" *ad hoc* and the Max Sontag type of *sideman* are, *in a sense*, "interchangeable" two or three times a year! But neither Max Sontag nor any sideman or subleader is interchangeable with any plaintiff or other established professional leader. A client who wants Ben Cutler would not choose one of Cutler's sidemen.

into account the economic realities of the music industry, as repeatedly reflected in the record. In those cases where the professional leader plays an instrument *while simultaneously discharging his distinctive and irreplaceable function of leading his orchestra,* he does so because he was engaged by his client to do so; and because he could have no business and could provide no jobs for sidemen *unless* he did so. He would never have been able to institute his orchestra and his business as orchestra leader if he, self-destructively, always refrained from leading by playing or singing or using his baton.

Even the Union witness, Stevens, who is not a professional or established orchestra leader, and who regularly performs as subleader and sideman, testified to the unique function of the leader. At first he answered negatively (Tr. 3054-55) the question whether there was a difference between the performances of leader and sideman on the same instrument. The Trial Court immediately picked up the direct examination:

> "The Court: When you play the instrument and you are the leader, don't you lead?
>
> The Witness: I lead with my trumpet, sir.
>
> The Court: Is there any difference between the way you play as a leader and the way you play as a sideman?
>
> The Witness: Not quality-wise nor quantity-wise. It would just be in motions.
>
> The Court: Motions with what.
>
> The Witness: With my trumpet. If I were leading the band—
>
> The Court: There is a difference, isn't there?
>
> The Witness: Yes." (Tr. 3055)

On cross examination, Stevens continued (Tr. 3087):

> "Q. * * * I believe you indicated that when you play the trumpet as a leader you move the instrument or

you move your body in such a way to indicate leadership in one way or another. A. Yes, sir. That's true.

Q. But isn't there also another difference? As leader don't you call the tunes, the sequence of tunes? A. As a leader * * * I think that I control the band completely on the bandstand. * * *

* * *

Q. When you are a sideman you do not have that control even when you play the trumpet? A. When I'm a sideman I do exactly what the leader wants me to do."

Respect for economic reality and for equal justice suggests that the orchestra leader's right to work *as orchestra leader* is at least as inviolable and as deserving of judicial protection against Union depredations (which threaten extinction of that right) as the employee's right to work. The latter right, as a matter of economic reality, depends upon the former. Without the former, it could not exist. Union contravention of the Sherman Act should not be excused in the instant cases by the ungrounded, unrealistic pretense that leaders are usurping the work of employee musicians. The leader's instrumental virtuosity, put to the use of *leading*, is initially the essential ingredient to his success as a leader. It is as much his characteristic function, as entrepreneur and employer in this field, as, in the automobile industry, it is the function of corporate executives to conduct the affairs of the corporation without union interference and without union dictation that union members should be allowed to perform those executive chores, where they are able to do so; because "otherwise" the executive is displacing a capable union member! There will always be some union members who could do at least *some* of the work performed by businessmen and shopkeepers. That gives no union the right to prohibit businessmen and shopkeepers from working as such.

The error of the Trial Court stems from the radical fallacy expressed in the Unions' main Brief as follows:

> "* * * in playing instruments leaders perform functions *identical with* those of acknowledged employees—sidemen—who are also union members." (p. 7; emphasis added)

The functions of orchestra leader and his employee-musicians are *not identical* (as the diverse treatment given leaders and employee musicians in AFM and Local 802 by-laws attests), whatever their apparent similarity.[8] Inter-

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[8] There is a *similarity* but certainly not an *identity* between the leaders of "the big bands" (men-like Tommy Dorsey, Paul Whiteman, Guy Lombardo, Les Brown, Lester Lanin, Ben Cutler, *et al.*) and the type of orchestra leader, generally known as "conductor" (Toscanini, Pierre Monteux, Bruno Walter, Tullio Serifin, Carl Schuricht, Sir Thomas Beecham, Stowkowfsky, Ernest Ansermet, Klemperer, *et al.*) who leads symphony and opera orchestras. In any listing of orchestra leaders the great conductors would, of course, be on top. What they mean to symphony orchestras and operatic ensembles is well known, at least superficially, to most civilized persons. The following somewhat florid and flamboyant quotation from "The Great Conductors" by Harold C. Schonberg, Music Critic of the New York Times, published in December, 1967 by Simon & Schuster, New York, shows the *similarity* and negates the *identity*. The classical conductors are probably almost always independent contractors. Even when they are employees, they are certainly "supervisors" within the definition given by the NLRA (Tr. 2859-65).

> "He is of commanding presence, infinite dignity, fabulous memory, vast experience, high temperament and serene wisdom. He has been tempered in the crucible but he is still molten and he glows with a fierce inner light. He is many things: musician, administrator, executive, minister, psychologist, technician, philosopher and dispenser of wrath. Like many great men, he has come from humble stock; and like many great men in the public eye, he is instinctively an actor. As such, he is an egoist. He has to be. Without infinite belief in himself and his capabilities, he is as nothing.
>
> "Above all, he is a leader of men. His subjects look to him for guidance. He is at once a father image, the great provider, the fount of inspiration, the Teacher who knows all. To call him a great moral force might not be an overstatement.

(Footnote continued on following page)

changeability, such as the Unions allege, is a Union myth suggested by the exigencies of argumentation. No one knows better than the sideman that he is not substitutable for the *professional leader,* no matter how ardently he might wish he were. This leader was able to establish himself and his business precisely because he (and not sidemen) did the sort of things which built up his reputation as an orchestra leader to the point where he acquired a following. One of the important functions of some leaders is

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Perhaps he is half devine; certainly he works under the shadow of divinity (or so a certain school of romantic idealism would have us believe). He has to be a strong man; and the stronger he is, the more dictatorial he is called by those he governs. He has but to stretch out his hand and he is obeyed. He tolerates no opposition. His will, his word, his very glance, are law.

"Sometimes his name is Wilhelm Furtwängler, sometimes Arturo Toscanini, sometimes Fritz Reiner, Leonard Burnstein, Arthur Nikisch or Otto Klemperer. It makes no difference. Whatever his name, he stands in front of a group of musicians as their conductor. He is there because somebody has to be the controlling force. Somebody has to set the tempo, maintain the rhythm, see to it that proper ensemble and balances are kept, try to get out of the score what the composer put into it. From his baton, from the tips of his fingers, from his very psyche, flows some sort of electric surcharge that shocks a hundred-odd prima donnas into bending their individual wills into a collective effort. His ears have a hundred-odd invisible tentacles, each one plugged, switchboard-like, into the very subconscious of each player under his command. Let one of those men play a faulty phrase or a wrong note, and that particular tentacle twitches. Immediate wrath then descends.

"He plays on these hundred-odd men, and gets his results in a variety of ways.

* * *

"Through his orchestra the conductor translates musical symbols into meaningful sound. Each conductor reads the symbols differently, for each is a different human being. 'How far is up?' asks the child. 'How fast is fast?' To the conductor, these are far from childish questions. How fast *is* fast? When Mozart writes 'allegro', is it a pace, a trot or a gallop? Each conductor has his own ideas. All he can do is follow his instincts, based on years of thought and study." (pp. 15, 16, 17, *passim*)

to lead while and by playing his instrument. As the Trial Court elicited from Union witness, Stevens (*supra*), there is a decisive difference between the manner in which an orchestra leader plays an instrument and the manner in which the sideman plays the same instrument. See Cross-petitioners' main Brief, pages 24-27, §§ 12-13. By playing his instrument the orchestra leader sets the pace, maintains the rhythm and the ensemble, and indicates the musical phrasing, the dynamics, the tempo, the emphases and the right balances for his employee-musicians to use. In other words, the leader *leads;* and the sideman *follows,* even when both of them play the same instruments at the same time during an engagement. *A leader is absolutely essential for any ensemble performance.* Every good orchstra needs a "controlling force". Obviously, a leader who merely uses a baton or sings, cannot plausibly be said to "replace" any instrumentalist.

Moreover, the record shows that orchestra leaders do not always instrumentalize. Most of them, like orchestra leaders Carroll and Ames, never play an instrument when their orchestras number more than eight (Tr. 958; 960-61; 1427). Some of them, like Peterson, never play an instrument (Tr. 1977-85) while leading. All of them decide when and whether they will play their instruments or not (Tr. 958). None performs on an instrument continuously during engagements. On the other hand, the sideman must perform continuously. If he is competent and docile enough to be a good sideman, he follows the direction of the leader. Otherwise, he is discharged or simply never again hired.

Every intelligent person, ordinarily conversant, even as a layman, with orchestra practice, knows that the function of the orchestra leader is not identical with that of the employee-musicians. The Trial Court's finding and the Union argument in this connection affront common sense. No unattested finding by a District Court can bridge the semantic gap between "identical" and "similar", to make them the same in meaning. For a further discussion

of the employer-businessman's right to function as such see Cross-Petitioner's Brief in Opposition to Petition for Writ of Certiorari, Point III, pages 15-18.

The record is bare of any evidence whatever that orchestra leaders like plaintiffs are *interchangeable* with their employees. Indeed, such "interchangeability" does not literally characterize even *ad hoc* orchestra leaders like Max Sontag (p. 798 ff. 1962 Trial), who obtains about three assignments *as an orchestra leader* per year from friends or relatives. Obviously, the latter did not regard Sontag as interchangeable with sidemen. But even if they did, that would not be relevant in the instant cases which involve only established, professional orchestra leaders. The clerk in a businesshouse who on occasion does some work which is similar to that of the business executive, the clerk in a shop who sometimes discharges duties similar to those performed by the shopkeeper is *not* "interchangeable" with the business executive or shopkeeper. The fact that the clerk can do some work similar to that performed by executive or shopkeeper should not, in a respectable jurisprudence, permit *unions* to decide, on some argument or catch-phrase like "displacement of employees", "interchangeability", or "job and wage competition", that neither shopkeeper nor business executive shall do work pertaining to their executive or managerial specialities, unless they submit to union bylaws.

The AFM Brief confuses the issue by suggesting repeatedly that the instant appeals concern the vast majority of those Local 802 members who act as sidemen.[9]

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[9] "In fact the vast majority of Local 802's members who act as orchestra leaders do so only occasionally; they are primarily sidemen." (AFM Brief, p. 9)

Exactly because they are "primarily sidemen", they merely *"act* as orchestra leaders". They are not said to *be* "orchestra leaders". Plaintiffs and the class represented by plaintiffs are not in that "vast majority".

What is or may be true of the "vast majority" of Union members who, now and then, act as "orchestra leaders" is obviously not necessarily true of *professional orchestra leaders.* If Max Sontag (typical of *ad hoc* leaders) were "interchangeable" with a sideman, it does not follow that "orchestra leader" Max Sontag or his sideman is interchangeable with any professional leader, like plaintiffs.

The Union Brief (p. 7) claims that "leaders' witnesses testified that an orchestra leader, in playing an instrument, fills the requirement for an instrument in the orchestra *just as any sideman does"* (emphasis added). This representation is based upon an equally erroneous, and utterly baseless, finding of the District Court (#44, App. 132) *allegedly* founded upon the following citations to the Transcript: Tr. 194-95, 842, 1313-14, 1353, 1375-76, 3054-55. Examination of these pages, however, reveals that they do not warrant either the finding of the Trial Court or the Union representation.[10]

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[10] Tr. 194-95 has nothing whatever to do with the proposition for which it was cited.

Tr. 842 actually contradicts that proposition. There, orchestra leader Kahner states that, when he uses a subleader to play a saxophone in his own stead, he hires as a replacement one who is *more than a saxophonist,* namely, a subleader *able to lead* while playing his instrument. Otherwise, he uses a subleader who plays a different instrument.

Tr. 1313-14 is part of the testimony of orchestra leader Sherry who agrees with Kahner.

Tr. 1353 is part of the testimony of orchestra leader Lefcourt, a pianist, who stated in effect that he would replace himself only "with a man in charge, a subleader", who could play the piano.

Tr. 1375-76 gives the similar testimony of orchestra leader Flatte.

Tr. 3054 is reproduced at page S-13 of the Supplement to Cross-petitioners' main Brief. It has nothing whatever to say on this subject. But in Tr. 3055 (already quoted above) Union witness Stevens, who is *not* a professional orchestra leader (but who does *lead* about 25 times per year and also regularly serves as a subleader and as a sideman) leads his orchestra *by playing his trumpet* in a different, distinctive way.

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Thus, it is untrue to say that an orchestra leader, by playing an instrument, simply fills a "requirement for an instrument in the orchestra, *just as any sideman does.*" The essential difference is the ability of the musician to *lead.* This is the leader's *forte.* It is also the needed qualification of the leader's *supervisor*[11] (namely, his subleader) in the *one or two cities* where subleaders are *sometimes* used, and of any sideman-turned-leader who attempts to assemble an orchestra and to "lead" it.

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In fact, the only testimony which the Trial Court cited (in Finding No. 45, App. 132) as having a bearing on the question of displacement of employee musicians was the interested, conclusory testimony of Max Arons (Tr. 3657):

> "Q. Do you recall also saying in this same affidavit: 'All that the Union has been attempting to do is to enforce uniform terms and conditions for all persons performing labor in connection with musical engagements whether the labor consists of playing an instrument or conducting the other musicians.'? A. That's correct. In my forty years as an official, I have seen sidemen become leaders and I have seen leaders become sidemen again. To me they are all working men who are members of the Union and need the protection of the Union.
>
> Q. When you use the words, 'uniform conditions' what was it you had in mind? A. Will you restate the question?
>
> Q. When you use the words 'uniform conditions' what did you have in mind? A. *To me a man who acts as a leader and plays an instrument or conducts is a working man, in other words, he is replacing somebody who played his instrument* and uniformly he should belong to the Union and his wages should be set and he should get the benefits, fringe benefits, when we negotiate, he should get the benefit of collective bargaining when we negotiate for him and to me except for the exceptional case, the majority of members are working men. The mere fact that he is a leader does not take him out of the category of working for a living." (emphasis added)

This is a pitifully inadequate basis for the Trial Court's conjectures about "replacement" and "interchangeability."

[11] Throughout the trial plaintiff orchestra leaders took the position that subleaders are, in fact and in law, "supervisors" (as defined in the NLRA) of employees of the orchestra leader.

5. The *Oliver* Case.

The briefs of petitioning Unions and of AFL-CIO rely heavily upon a caricature of the *Oliver* case (See AFM Brief, pp. 23-24, 34-35, 37, 41-42, 45-46, 53-55, 57 and 66). The following comparison between the instant cases and *Oliver* demonstrates that Union reliance upon *Oliver* is misplaced; and that "the economic factors which govern the unions' actions" here are *not* "identical to those in *Oliver*". (Unions' Brief, p. 42):

1. In the *Oliver* case, there was multi-state collective bargaining between employers and union; in the instant case there never was bargaining between plaintiff orchestra-leader-employers and AFM or its Locals; and no-bargaining is a deliberate AFM policy. Canons of law developed out of the duty to bargain collectively have no valid application to protect the Unions here.

2. The so-called *independent contractors* in *Oliver* were *owner-drivers.* They were not *employer-businessmen.* They did exactly the same work as union members who were *employee-drivers,* who did not own the trucks they were driving. In the instant case, plaintiffs and the class represented by them are all *employers and businessmen.* They are *not* interchangeable with their employees and *vice-versa;* and they do not perform the same work.

3. In *Oliver,* this Court did *not* decide whether the owner-drivers were or were not in a "labor group". In the instant cases, the Trial Court erroneously placed orchestra-leader-entrepreneurs and *employers* in the "labor group".

4. No claim was made, in the *Oliver* case, of violation of the Sherman Act. The only law violated was a State law, which contravened paramount Federal law. In the instant case, the Unions, acting in combination with *non-labor groups,* flout the Sherman Act, as construed in *Allen-Bradley.*

5. In *Oliver,* a finding that the owner-drivers constituted a "labor group" would have been anomalous, because that category is significant only under the antitrust laws; and no Federal antitrust law violation was charged in the *Oliver* case. In the instant cases, however, the anomaly is that the Trial Court found *businessmen-employers,* like plaintiffs, to be in a "labor group".

6. There was a collective bargaining agreement in *Oliver* and the owner-drivers were covered by it; no *employer* was in the bargaining unit or in the Union. In the instant cases, there never was a collective bargaining agreement and orchestra-leader-employers are union members.

7. The collective agreement in *Oliver* contained an Article XXXII which regulated "minimum rentals and certain other items of lease when a motor vehicle is leased to a carrier by an owner who drives his vehicle *in the carrier's service*" (at p. 284, emphasis added). The owner-drivers were in fact *in the service* of carriers; *i.e.,* they were for all practical purposes regarded as employees of the carrier. They were indistinguishable in function from other truck-driver-employees who were not owner-operators. Functionally, they were employees, substitutable for employees. In the instant case the plaintiffs are not in the *service of any employer.*

8. In *Oliver* the competitor owner-drivers did not produce jobs or employment for the non-owner drivers. The carriers produced jobs for both sorts of drivers. In the instant cases, the orchestra-leader employers produce[12] jobs

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[12] The AFM Brief (pp. 53-54) makes the ridiculous statement:

"The record shows an abundance of competition among leaders of no particular fame to provide music which the purchaser has planned, and no evidence that as much as one club date engagement has ever taken place because a leader created the demand." In the

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for the employee musicians. The latter do not produce jobs, anymore than did the drivers.

9. The AFL-CIO discussion of the *Oliver* case (p. 24 of its Brief) is relevant here:

> "In *Oliver,* as here, the union sought to regulate the minimum compensation received by independent contractors, who were in direct job and wage competition with employee union members since they render essentially the same service."

Actually, in *Oliver,* there was job and wage competition because there was no job uniqueness. Driving a truck was exactly the same chore for the owner-driver as for the non-owner-driver. In fact practically anybody can drive a truck. It is, obviously, not so easy to become a professional orchestra leader. No established, *professional* orchestra leader renders essentially the same labor service as his sidemen. The sideman does not provide jobs for other sidemen. The sideman is not interchangeable with the established, professional orchestra leader. If he were, he would improve himself by becoming an orchestra leader (whose profits supply greater income

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first place, the competition among leaders "of no particular fame" does not affect plaintiffs or other established, professional orchestra leaders who have built up at least the kind of reputations which provide them with clienteles which are steady and profitable. Clients of plaintiffs and of other established and professional orchestra leaders do *not* plan the music supplied by their orchestras. As to the comment that there is no evidence that even one club date has ever taken place because a leader created the demand, there are two answers. There is repeated and undenied evidence that professional leaders engage in advertising and constant solicitation of accounts. These create demand. In the second place, if established, professional orchestra leaders do not create the demand for music, how does that demand arise? Certainly not because of *ad hoc* leaders, like Max Sontag. Nor is it because of any work performed by the sideman or Union. Actually, what the Union has been doing has decreased the demand for music in recent years.

than the wages of sidemen). Even when an orchestra-leader-employer performs an instrument, he does not render "essentially the same service." He *leads* his orchestra by doing so and in doing so: his musical phrasing, his dynamic emphases, his balancing of tempo and dynamics, the nods of his head and the other signs or signals which he gives to his sidemen differentiate *his* playing from that of his sidemen, who must follow his leading. The orchestra leader almost *never* plays an instrument *throughout* his engagement. He performs when he thinks he should. The sideman must play his instrument during the whole engagement. Thus, there is *no* job or wage competition between the orchestra leader and his sidemen. No established professional orchestra leader in his right mind would want to compete with his own or any employee musicians for either their jobs or their wages.

10. In the instant cases, defendant Unions, unlike the Union in *Oliver*, evade their statutory duty to bargain collectively with orchestra-leader-employers by unilaterally substituting Union bylaws for labor contracts. It can hardly be argued that unilateral imposition of Union bylaws is the equivalent of a labor contract.

11. The narrow question before this Court in *Oliver* (358 U. S. at 285 and 295) was whether "Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which the Federal law directs them to bargain." In the instant cases, there was no carrying out of any labor agreement, because there was no such agreement. AFM and Local bylaws are part of a Union system of law evasion respecting subject matters as to which no "Federal law directed the parties to bargain."

12. Article XXXII of the collective bargaining agreement in *Oliver* was, according to this Court's decision, necessary to prevent undermining of the *negotiated*

drivers' wage scale (at p. 289); because the carriers had exploited the lessor status of owner-drivers for the purpose or with the effect of threatening the wage standards of the Union. In the instant cases, there never was exploitation of employee-musicians by established, professional leaders. There was *Union* wrong-doing: minimum prices, Union suppression of competition, coercion of leader-employers into the Union, dictatorial and unlawful mandate of closed shops, etc., which are not in any sense necessary to prevent undermining of "negotiated" wages, both because there were no negotiations, and because Federal law forbids such wrong-doing. The unlawful Union practices in these cases were *not* necessary to prevent undermining of the unilaterally promulgated Union wages; because all witnesses agreed that leader-employers uniformly pay the minimum wages unilaterally (and unlawfully) prescribed by defendant Unions. See in this connection the testimony of AFM President Kenin (1, 26-27); Manuti, President of Local 802 (68-69, 75-76); booking agent Willard Alexander (189-90, 193, 195-96); Local 802 official Brown, charged with policing engagement contracts (241-42); Local 802 Secretary (now President) Arons (Tr. 3655).[13]

13. In *Oliver* price-fixing was not really involved, but only wages. Thus, this Court said: "Looked at in this light * * * to determine its relevance to collective bargaining rights under the Federal Act, the point of the Article [XXXII] is obviously not price-fixing but wages." In the instant cases, price-fixing is undeniable and is admitted in the AFM main Brief at pp. 11, 24-27, 32, 42, 43, 47, 48, 51, 52-53, 59; although at other places, defendant Unions seem to deny price-fixing (16, 30-32, 42-46).

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[13] Neither plaintiffs Carroll nor Peterson has been a Union member for 6 years. Yet they have constantly paid Union scale during that time. The Unions' main Brief states (p. 12): " * * * When a leader receives less than union scale from the purchaser, the sidemen invariably receive less than scale wages", as if this were a natural law. But the statement is contradicted by the record.

14. In *Oliver*, there was *no* combination by the involved union with *non-labor groups;* in the present cases such combination has plainly been in operation for years; and it is highly efficient.

15. The *Oliver* case was not complicated by the existence of a group of marginal truck drivers. The instant cases are somewhat confused by the existence of a large group of *marginal* "orchestra leaders". Defendant Unions, the Trial Court and the Second Circuit (especially Judge Friendly) were all misled by the existence of a very large group[14] of *ad hoc* orchestra leaders (*employee musicians* who *on occasion* file contracts as "orchestra leaders") into disbelieving the existence of a class of *established, professional orchestra leaders* like plaintiffs. However, it is not logical to discredit the existence of a class of established, professional orchestra leaders simply because there is a larger class of *ad hoc,* marginal orchestra leaders (who do not earn their livelihoods as such; who enjoy no reputation in their localities; and who have not, by the excellence or popularity of the bands they occasionally assemble, acquired clienteles which can be depended upon to provide livings for such leaders).

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[14] Mortimer J. Adler in *"The Conditions of Philosophy"* (Atheneum, New York, 1965) wrote illuminatingly upon the gradations of beings or persons to whom a particular category or universal idea can be applicable; and what he wrote reveals analogously the root error committed below with respect to the universal, "orchestra leaders":

> "There is a continuum, as I see it, between the novice in any sport, and the champion player of the game. They are both engaged in playing tennis, golf, or baseball, though the one does it with little and the other with consummate skill. The vast difference in degree of competence which separates them does not prevent us from acknowledging that both are playing the same game. On the contrary, precisely because it is the same game, we also recognize that the inexpert at it can learn from the more expert, acquiring through imitation and practice higher degrees of skill and satisfaction. The same holds true of every

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16. In *Oliver,* there was proof that the union wage scale for owner-operators *would be subverted* by permitting owner-operators (who were all union members) to charge any rental whatever for their trucks. In the instant cases, there was no proof whatever of subversion by plaintiffs or other professional orchestra leaders, of any Union scale. Professional leaders always pay at least Union scale.

17. In *Oliver,* the contract regulation was only "*in form* a scheme for fixing prices for the supply of leased vehicles * * *" (381 U. S. at 690, note 5). In the instant cases, AFM and Local Bylaws *both in form and in substance* are schemes for fixing prices, for monopolistically regimenting the industry, for unreasonably interfering with interstate commerce and for suppression of competition.

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> art. The child who begins to draw pictures or the man who begins to paint stands at one end of a continuum which has Leonardo or Michelangelo at the other. The woman who plans and cooks meals may never become Escoffier but she improves by acquiring in some degree the understanding and techniques of culinary matters which lesser cooks, who are her preceptors, pass on to her.
>
> "Thus it is with the philosophizing done by the layman and the professional. Both are engaged in the same intellectual activity. The difference between Socrates and the ordinary man, each thinking about the nature of things, the choices that life presents, and the values which bear on them, is one of degree, not of kind, as is the difference between the champion at a particular sport and the tyro or the difference between Leonardo or Escoffier in their particular arts and the novice. * * *" (pp. 9-10)

The established, professional orchestra leader, like any of the plaintiffs is also part of such a *continuum,* as Adler describes. At one end are the leaders of "The Big Bands", and, doubtlessly, above them "The Great Conductors" (see footnote 8, p. 19, *supra*). At the other end are the Max Sontags, who improvise as "orchestra leaders" two or three times a year. A line must be drawn across this continuum to cut off from consideration in these cases the "vast majority" of "orchestra leaders" who, unlike plaintiffs, do not earn their livelihoods from leading, have no regular employees, have no stable or dependable clientele and have no reputations or fame as leaders.

The foregoing seventeen *differentiae* demonstrate that the *Oliver* case cannot be used to defend the Union conduct here.

6. The *Senn* Case Distinguished.

In *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468 (1937), an independent contractor, named Paul Senn, was engaged in the tile-laying business, generally without an employee. His annual income was extremely modest, being about $1,500 per year. About half of this amount was derived from his own manual work. Occasionally, depending on his contracts, he used one helper and one tile layer. Senn refused to sign an agreement with the union because under union rules he would not be allowed personally to work with his helper. Strike and picketing ensued; and Senn sought an injunction. This Court (four Justices dissenting) held that there was reasonable ground for the presumption: (1) that the closed shop (which at that time was lawful under Federal law) as well as the union rule prohibiting employers from working were actually necessary to maintain standards in the disorganized industry and (ii) that for the unions to have set aside its rules in the case of Senn would have been to discriminate against other employers.

This Court also held that there was no constitutional objection to a State's refusing to grant injunctive relief against picketing to obtain a closed shop. It upheld the *right of a union to picket* for the purpose of inducing an employer to sign a closed shop which would forbid him, as employer, to work with his hands and tools, saying:

> "The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. . . . The legislature in Wisconsin had declared that 'peaceful picketing and patrolling' on the public streets and places shall be permissible 'whether engaged in singly or in numbers'

provided this is done 'without intimidation or coercion' and free from 'fraud, violence, breach of peace or threat thereof.'" (*Ibid.*, at pp. 478-80)

The decision of this Court in *Senn* was significantly influenced by the demoralized conditions in the tile laying industry; and by the need for some rule to prevent then-rampant, *fraudulent partnerships* in the industry, where workers were dubbed "partners" and were then left without workmen's compensation coverage. [Professional leaders always cover their employees with required insurances. The record shows this without contradiction.]

Before *Senn*, a strike to prevent an employer from working with his men had been generally regarded, as the four dissenting Justices regarded it in the *Senn* case, as a strike to deprive the employer of constitutional liberties. *Truax* v. *Corrigan*, 257 U. S. 312 (1921); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Roraback* v. *Motion Picture Operators Union*, 140 Minn. 481 (1918); *Hughes* v. *Kansas City Motion Picture Machine Operators*, 282 Mo. 304 (1920); *Parke Paint & Wallpaper Company* v. *Local Union*, 87 W. Va. 631 (1921).

1. *The Senn case disinguished from the instant cases.* The *Senn* case hearings were concerned mainly with questions of State law. The State courts had ruled that the controversy was a "labor dispute" under the State anti-injunction act and that the acts done by defendant union were lawful. The issues involved construction and application of a State statute and of the State Constitution; and as to them judgment of the State's highest court was conclusive. No similar statements can be made about the instant cases.

Senn did contend that the right to work in his business with his own hands is a right guaranteed by the Fourteenth Amendment and that the State may not authorize unions to employ publicity and picketing to induce him to refrain

from exercising it (301 U. S. 468, 478). Judgment of the highest court of the State had established "that both the means employed and the ends sought by the union are legal under its law". Therefore, the question before this Court in *Senn* was "whether either the means or the end sought is forbidden by the Federal Constitution." In the instant cases, we are concerned not with Constitutional law but with the Sherman Antitrust Act, as construed in *Allen-Bradley* and similar cases. In *Senn*, the employer was protesting against picketing and publicity. In the instant cases, cross-petitioners are protesting against violation of the Sherman Act. This Court held in *Senn* that:

> "Members of the union might, without special statutory authorization by a State make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. * * * If the end sought by the union is not forbidden by the Federal Constitution, the State may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends."

The combination in the instant cases has for its purpose or effect not dissemination of information, but violation of a valid Federal statute, as construed in *Allen-Bradley*. In *Senn*, the majority of this Court made no ruling about the right of an employer *to work as such;* it merely held, in effect, that a union also had a right to picket and to engage in publicity, no matter how the picketing and publicity affected the employer's business. In the instant cases, defendant Unions claim the right to do unlawful things (such as price-fixing and suppression of competition) as corollaries to indefensible assertions: (i) that employers may be forced into Union membership along with their employees and thus be made to obey Union bylaws; and (ii) that employers like plaintiffs, who work at their professions according to the common and accepted mode of functioning in that pro-

fession, are threats to the jobs and wages of other Union members. *Senn* performed the *identical work* performed by the tile layers he occasionally hired as employees. Orchestra leaders do *not* perform work identically like that done by sidemen or even subleaders.[15] At the time of the *Senn* case, there was no Federal law which prohibited unions from coercing employers or self-employed persons into union membership. There is such a statute today. Plaintiffs here supply sidemen with jobs and wages; and they can do that only on condition that they are allowed to function as orchestra leaders normally function and are required by the public to function.

2. *The Senn case is outmoded by Federal law.* The NLRA, as amended, forbids the closed shop and forbids unions from "forcing or requiring any employer or self-employed person to join any union * * *" (§ 8 (b) (4) (A)) by inducing or encouraging any employee to refuse to perform services for such employer. The Unions in the instant cases "represent" and *purport to represent* plaintiffs' employees. They assert, also, the right and power to refuse to permit those employees to work for plaintiffs, unless the latter comply with Union bylaws fixing prices and suppressing competition. None of these factors was present in *Senn*, which is outmoded because of the Taft-Hartley and Landrum-Griffin Acts.

3. *The Senn case should be overruled.* Because of intervening Congressional amendments, the rationale of the bare majority in *Senn* deserves reappraisal (See especially

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[15] In addition to exercising the skill of a sideman the leader has the ability to impress on his orchestra his individual style, his rhythm, tempo, tone coloring, balance and ensemble qualities. He also has the business acumen to convert the collective performances of sidemen and subleaders into a marketable musical commodity. As entrepreneuer, he negotiates engagement contracts which his reputation and advertising attract. Thus he is creative not only artistically but also businesswise, thereby augmenting employment.

NLRA § 8 (b) (4) (A)). Unions today (least of all AFM Unions) are not demoralized as was the tile laying union in *Senn's* case. There is no danger here from false partnerships or loss of legally required insurances, as there was then in the construction industry. Especially against the background of statutory change, the dissent in *Senn* seems more conducive to equal protection of laws, more in conformity with the objectives of true administration of justice, more consistent with regnant legislative policy and more sensitive to the demands of due process than the opinion of the bare majority in 1937.[16]

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[16] Particularly applicable here is the following rationale from Mr. Justice Butler's dissenting opinion:

"The principles governing competition between rival individuals seeking contracts or opportunity to work as journeymen cannot reasonably be applied in this case. Neither the union nor its members take tile laying contracts. Their interests are confined to employment of helpers and layers, their wages, hours of service, etc. The contest is not between unionized and other contractors or between one employer and another. The immediate issue is between the unions and plaintiff in respect of his right to work in the performance of his own jobs. If as to that they shall succeeed, then will come the enforcement of their rules which make him ineligible to work as a journeyman. It cannot be said that, if he should be prevented from laboring as a helper or layer, the work for union men to do would be increased. The unions exclude their members from jobs taken by non-members. About half the contractors are not unionized. More than 60% of the tile layers union are non-union men. The value of plaintiff's labor as helper and tile layer is very small—about $750 per year. Between union members and plaintiff there is no immediate or direct competition. If, under existing circumstances, there ever can be any, it must come about through a chain of unpredictable events making its occurrence a mere matter of speculation. The interest of the unions and the manual labor done by plaintiff is so remote, indirect and minute that they have no standing as competitors. Berry v. Donovan, 188 Mass. 353, 358 * * *. Under the circumstances here disclosed, the conduct of the unions was arbitrary and oppressive. Roraback v. Motion Picture Machine Operators Union, 140 Minn. 481, 486, 168 N. W. 766, 169 N. W.

(Footnote continued on following page)

By the 1947 and 1959 amendments, Congress wanted to exclude "supervisors" from the employees' bargaining units. *A fortiori,* employers should be excluded.

Conclusion

The judgment of Second Circuit reversing the District Court on the issue of price-fixing should be affirmed; its judgment on the issues of suppression of competition, unreasonable burdens on interstate commerce and other monopolistic practices of defendant Unions should be reversed or modified to grant plaintiffs the relief sought in their complaints; and professional orchestra-leader-employers should be excluded from membership in defendant Unions.

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(Footnote continued from preceding page)

529, 3 A. L. R. 1290; Hughes v. Motion Picture Machine Operators, 282 Mo. 304, 221 S. W. 95."

Toward the end of his dissent, Justice Butler pointed to the inherent violation of "a principle of fundamental law: 'that no man may be compelled to hold his life or the means of living at the mere will of others.'" Orchestra leaders' regimentation by the defendant Unions makes a mockery of this principle and of freedom under law.